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How Do We Deal with This Mess? A Primer for State and Local Governments on Navigating the Legal Complexities of Debris Issues Following Mass Disasters

Ryan M. Seidemann

Megan K. Terrell

Christopher D. Matchett

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How Do We Deal with This Mess? A Primer for State and Local Governments on Navigating the Legal Complexities of Debris Issues Following Mass Disasters

RYAN M. SEIDEMANN
MEGAN K. TERRELL
CHRISTOPHER D. MATCHETT*

I. INTRODUCTION	1136
II. WE'RE FROM THE GOVERNMENT, AND WE'RE HERE TO CONFUSE YOU	1138
A. <i>The Stafford Act</i>	1139
B. <i>FEMA Rules and Regulations</i>	1139
III. RIGHT-OF-ENTRY, DEBRIS REMOVAL, AND DEMOLITION	1143
IV. VEHICLES AS DEBRIS	1150
V. HUMAN REMAINS AS DEBRIS	1154
A. <i>Problems with Unearthed Remains</i>	1154
B. <i>Archaeological Concerns with Unearthed Remains</i>	1156
VI. PROBLEMS	1157
A. <i>What Do We Do with All of This Stuff?</i>	1158
B. <i>Liability Issues</i>	1159
C. <i>Using Public Things to Benefit Private Property</i>	1161
D. <i>Historic Preservation Concerns</i>	1162
1. COMPLIANCE WITH HISTORIC PRESERVATION LAWS	1162
2. ARCHAEOLOGICAL ARTIFACTS	1162
VII. CONCLUSION	1164
APPENDIX 1. A PROPOSED DEBRIS MANAGEMENT STATUTE	1165

* Ryan M. Seidemann holds a B.A. and an M.A. in anthropology from Florida State University and Louisiana State University ("LSU"), respectively. He also holds a J.D. and a B.C.L. from LSU's Paul M. Hebert Law Center. He is licensed to practice law in Louisiana. Megan K. Terrell holds a B.S. in general business from LSU and a J.D. and B.C.L. from LSU's Paul M. Hebert Law Center. She is licensed to practice law in Louisiana. Christopher D. Matchett holds a B.A. with honors in Political Science from DePauw University and a J.D. from Indiana University School of Law at Indianapolis. He is licensed to practice law in Louisiana and the District of Columbia. The authors are Assistant Attorneys General in the Civil Division of the Louisiana Department of Justice who worked on debris-related legal issues following Hurricanes Katrina and Rita in 2005. The views and opinions expressed herein are solely those of the authors and do not necessarily represent the position of the Louisiana Department of Justice or the Attorney General. Portions of this paper were presented at the Louisiana Solid Waste Association Conference in 2006 in Lafayette, Louisiana, and at an invited panel discussion on debris matters at Tulane University Law School in 2006 in New Orleans, Louisiana. The authors wish to thank Ericka Seidemann and Rachel Watson for their critical reviews of previous versions of this Article.

When the world is storm-driven and the bad happens and the worse that threatens are so urgent as to shut out everything else from view, then we need to know all the strong fortresses of the spirit which men have built through the ages.

– David McCullough¹

I. INTRODUCTION

The devastation wrought by the 2005 hurricane season brought into bold relief the need for comprehensive debris management plans in the United States. As cleanup efforts following Hurricane Katrina commenced, it became evident that local governments were not prepared to deal with the debris problem's massive scope.

As the state government in Louisiana attempted to bridge the communication and readiness gap between the Federal Emergency Management Agency ("FEMA") and the impacted local governments, the Louisiana Attorney General's Office issued several opinions addressing the rights and duties of the various parties.² While these opinions were helpful guides in the debris management process following Hurricanes Katrina and Rita, it became apparent that this was a national – and not just a local – problem.³ Because of this realization, the opinion authors (most of whom are also authors of this Article) felt it necessary to provide guidance to other jurisdictions in the hopes that they will be better prepared to handle debris issues that may accompany future natural or anthropogenic disasters.⁴

This Article is a culmination of the research for the original Attorney General opinions, as well as subsequent work. It should provide lawmakers and local administrators with the knowledge to navigate FEMA's confusing rules on debris management from a legal perspec-

1. *Medal Honors McCullough*, Advoc. (Baton Rouge, La.), Dec. 22, 2006, at 8B (quoting historian David McCullough).

2. See, e.g., Op. Att'y Gen. La. 05-0381 (2005), 2005 WL 3635643; Op. Att'y Gen. La. 05-0373 (2005), 2005 WL 3115350; Op. Att'y Gen. La. 05-0360 (2005), 2005 WL 2865900; Op. Att'y Gen. La. 05-0360-A (2005), 2005 WL 2865901.

3. This sentiment is supported by the information presented in a recent article, which noted that "[t]he United States is at [a] 'significant risk' of natural disaster. In the past two decades, the President has declared over 700 major disasters. Many of these disaster events have generated substantial volumes of debris that result in enormous challenges for local communities." Kathryn A. Wasik, *Municipal Liability for Disaster Debris Disposal*, 19 TUL. ENVTL. L.J. 339, 353 (2006) (internal footnotes omitted).

4. It should be noted that anthropogenic disasters are treated somewhat differently from natural disasters by FEMA. See, e.g., Ernest B. Abbott, *Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues*, 37 URB. LAW. 467, 468 (2005) (providing a comprehensive discussion of the differences between FEMA's treatment of anthropogenic disasters and natural disasters).

tive, as well as to ensure that those leaders are prepared for the worst in their own communities before the worst happens.

Although recent events have focused the nation's attention on hurricane damage in the southeastern United States, the need for comprehensive debris management plans is not so geographically limited. Virtually no portion of the United States is immune from disaster: the western portion of the country suffers from periodic earthquakes, mudslides, fires, and volcanic activity;⁵ the Pacific region is threatened yearly by typhoons and perennial dangers from seismic activity and tsunamis;⁶ the Midwest is at risk for floods, tornadoes, and earthquakes;⁷ the Southeast, Atlantic seaboard, and Caribbean territories are in the path of tropical cyclones;⁸ and the entire nation is at risk of such anthropogenic disasters as those resulting from terrorist activities.⁹ These

5. See, e.g., Peggy Andersen, *Scientists: St. Helens Eruption Slowing*, ASSOCIATED PRESS, Sept. 30, 2006 (discussing recent volcanic activity in Washington state); Richard K. De Atley, *Fatigue Factor: 4,000 Firefighters on Hand; Largest Blaze 50 Percent Contained; Man's Body Found*, PRESS ENTERPRISE (Riverside, CA), July 16, 2006, at A1 (discussing one instance of Western wildfires); Steve Fetbrandt, *Mudslides Weigh on San Jacinto; Strategy: Residents Push for Precautions as Officials Tout Long-Term and Multiagency Plans*, PRESS ENTERPRISE (Riverside, CA), Sept. 23, 2006, at B01 (reporting mudslide problems in California); Martin Weil, *Violent Earthquake Strikes Northern California, Killing Dozens, Causing Widespread Damage; Sections of Bridge, Highway Collapse in Rush Hour*, WASH. POST, Oct. 18, 1989, at A1 (discussing the impact of the 1989 San Francisco earthquake).

6. See, e.g., Alexandre da Silva, *Hawaii Tests Tsunami, Hurricane Preparedness*, ASSOCIATED PRESS, May 17, 2006 (describing mock disaster drills in Hawaii); *President Bush Declares Major Disaster in Northern Mariana Islands*, ASSOCIATED PRESS, Aug. 28, 2004 (reporting the devastation following typhoon); *Quake Disaster Loans Run into the Millions*, ASSOCIATED PRESS, Nov. 15, 2006 (discussing expenses related to magnitude 6.7 earthquake in Hawaii in 2006).

7. See, e.g., FED. EMERGENCY MGMT. AGENCY, *MIDWEST TORNADOES OF MAY 3, 1999: OBSERVATIONS, RECOMMENDATIONS AND TECHNICAL GUIDANCE*, at xi-xii (1999) (reviewing the impact of one day of devastating tornadoes in Oklahoma and Kansas); Mark Hagen, *Midwest Farmers Still Feel '93 Flood's Effects*, CHI. SUN-TIMES, Feb. 27, 1994, at 30 (discussing the impact of substantial Midwest flooding); *More Twisters Hit Texas; 6 States Clear Wreckage*, ST. LOUIS POST-DISPATCH, Mar. 15, 1990, at 11A (discussing the fallout from tornado damage in six Midwestern states); Betsy Taylor, *New Madrid Earthquake Preparation Poses Unique Challenges*, ASSOCIATED PRESS, Nov. 2, 2006 (discussing the potential for Midwest earthquakes).

8. See, e.g., JAY BARNES, *NORTH CAROLINA'S HURRICANE HISTORY* (rev. ed. 1998) (reviewing North Carolina's hurricane history); GORDON E. DUNN & BANNER I. MILLER, *ATLANTIC HURRICANES* 244-78 (1964) (reviewing general hurricane history); JAMES A. HENRY, KENNETH M. PORTIER & JAN COYNE, *THE CLIMATE AND WEATHER OF FLORIDA*, 169-218 (1994) (reviewing Florida's hurricane history); NEWS & COURIER & EVENING POST, . . . AND HUGO WAS HIS NAME (1989) (discussing the devastation of Hurricane Hugo in South Carolina); Katherine Bouma, *Stormy Years Predicted For State - Global Warming Invites Droughts, Hurricanes*, BIRMINGHAM NEWS, Nov. 3, 2006, at 1C (noting predictions for increased hurricanes and other calamities in Alabama in coming years); *Tropical Storm Chris Nears Caribbean*, CHATANOOGA TIMES FREE PRESS, Aug. 2, 2006, at C6 (discussing threats posed to Caribbean territories from a 2006 hurricane). See generally PETE DAVIES, *INSIDE THE HURRICANE: FACE TO FACE WITH NATURE'S DEADLIEST STORMS* (2000) (recounting general hurricane history).

9. See, e.g., Julie DelCour, *Why?: Oklahoma Scarred by Incomprehensible Tragedy*, TULSA

events have the potential to leave massive quantities of debris, both on public and private property,¹⁰ threaten public health and safety and the environment, and hinder the rebuilding and recovery process.¹¹

II. WE'RE FROM THE GOVERNMENT, AND WE'RE HERE TO CONFUSE YOU

When disaster strikes, there often is not much time for the quiet contemplation characteristically necessary to interpret federal law. Not long after the 2005 storms, two major concerns emerged: (1) what to do with all the debris; and (2) who would pay for its cleanup. While the tax base for local governments had been scattered across the country during the mass exodus from South Louisiana due to Hurricanes Katrina and Rita,¹² the political subdivisions were rightfully concerned that they would not be able to afford the costs of debris removal and cleanup. Accordingly, they turned to the State for answers, and the State, in turn, turned to FEMA. Thankfully, FEMA has reimbursement provisions in its Public Assistance ("PA") program;¹³ correctly interpreting the law in a disaster's wake to ensure that local governments' expenses are covered, however, can be maddening. Being able to correctly navigate the complex maze of FEMA laws, rules, and regulations is essential; as Abbott remarked, "because FEMA programs are reimbursement programs, where FEMA provides grant funding of expenditures already

WORLD, Dec. 31, 1995, at N1 (reviewing the devastation wrought by home-grown terrorists in wake of Oklahoma City bombing in 1995); *Two Planes Strike World Trade Center; Terrorists Blamed; Aircraft Crashes near Pentagon*, BUFFALO NEWS, Sept. 11, 2001, at A1 (providing an early news report of the 9/11 terrorist attacks).

10. See, e.g., Joe Cantlupe & Dana Wilkie, *San Diego Battles FEMA for Millions over Fire Debris*, Copley News Service, Sept. 22, 2004 (reviewing San Diego's recent problems getting FEMA reimbursement for removal of fire debris from private property, despite studies showing hazardous nature); Shearon Roberts, *Jefferson Makes Mulch After the Wind Blows; Plan Streamlines Storm Debris Removal*, TIMES-PICAYUNE (New Orleans), Aug. 4, 2005, at 1 (noting substantial amounts of green debris on public and private property in the New Orleans area following Tropical Storm Cindy in 2005); Patrick Whittle, *A Lesson from the Panhandle; Escambia County Finds a Way to Win FEMA's Help with Cleanup*, SARASOTA HERALD-TRIB., Dec. 3, 2004, at A1 (discussing Florida's problems with debris removal from private property in 2004).

11. See, e.g., Paul Rioux, *Reconstruction Plans Begin in St. Bernard but Oil Spill Adds to the Health Risks*, TIMES-PICAYUNE (New Orleans), Sept. 10, 2005, at A13 (commenting that "[r]ebuilding . . . will be a gargantuan task in a parish where almost every structure took in from 10 to 20 feet of water and roads were still blocked by debris").

12. Melinda DeSlatte, *Katrina Leaves Louisiana's Budget Tattered*, ASSOCIATED PRESS, Sept. 8, 2005.

13. "Under the PA Program, which is authorized by the Stafford Act, FEMA awards grants to assist State and local governments and certain Private Nonprofit (PNP) entities with the response to and recovery from disasters." FED. EMERGENCY MGMT. AGENCY, DEP'T OF HOMELAND SECURITY, FEMA 322: PUBLIC ASSISTANCE GUIDE 3 (1999) [hereinafter FEMA-322]. Much of this assistance is provided in the form of reimbursement grants. *Id.* at 4.

made by a community, it becomes particularly important for a community to understand what is eligible for federal assistance.”¹⁴ If local governments do not get eligibility right, their penalty may be the inability to obtain reimbursement for their massive debris management expenditures.¹⁵

A. *The Stafford Act*

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”), originally enacted as the Disaster Relief Act of 1974,¹⁶ provides FEMA with broad authority to assist local governments with debris removal.¹⁷ Primarily, FEMA employs Section 403(A)(2) of the Stafford Act for disaster-related debris matters.¹⁸ This provision empowers the president to authorize grants to “any state or local government for the purpose of removing debris and wreckage resulting from a major disaster from publicly or privately owned lands and waters.”¹⁹ At first blush, this provision appears to be a godsend for local governments inundated with debris and debt following a disaster. As can be seen *infra*, the same picture emerges from the regulations promulgated pursuant to Stafford Act authority.²⁰ After analyzing FEMA’s internal rules and publications, however, the facially simple process for securing certain types of debris removal reimbursement grants, especially for debris removed from private property, is complicated. The actual application of the law and regulations becomes convoluted as it works its way through FEMA’s process. This makes it difficult to navigate the specific requirements for reimbursement.

B. *FEMA Rules and Regulations*

The regulations that control reimbursement for debris removal from FEMA are found at 44 C.F.R. § 206.224.²¹ Part (a) of this section indicates that “[u]pon a determination that debris removal is in the public

14. See Abbott, *supra* note 4, at 468.

15. See, e.g., FEMA-322, *supra* note 13, at 89 (noting that “FEMA may be required to deobligate funds after the initiation of a project” for failure to comply with certain laws).

16. Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (codified as amended in scattered sections of 42 U.S.C.). The name was later changed to the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Disaster Relief and Emergency Assistance Amendments of 1988, Pub. L. No. 100-707, 102 Stat. 4689.

17. § 403, 88 Stat. at 143; see also 42 U.S.C. § 5173(a) (2006).

18. 42 U.S.C. § 5173(A)(2).

19. *Id.*

20. See *infra* text accompanying notes 21-24.

21. FED. EMERGENCY MGMT. AGENCY, DEP’T OF HOMELAND SECURITY, RECOVERY DIV. POLICY NO. 9523.13, DEBRIS REMOVAL FROM PRIVATE PROPERTY 2 (2001) [hereinafter FEMA-9523.13] (citing 44 C.F.R. § 206.224 (2001)).

interest, the Regional Director may provide assistance for the removal of debris and wreckage from publicly and privately owned lands and waters.”²² Although this portion of the regulation largely tracks the debris removal provisions of the Stafford Act, it does not detail what “public interest” means. This term is explained in pertinent part in 44 C.F.R. § 206.224(a)(1-4):

Such removal is in the public interest when it is necessary to:

- 1) Eliminate immediate threats to life, public health, and safety; or
- 2) Eliminate immediate threats of significant damage to improved public or private property; or
- 3) Ensure economic recovery of the affected community to the benefit of the community-at-large; or
- 4) Mitigate the risk to life and property by removing substantially damaged structures and associated appurtenances as needed to convert property acquired through a FEMA hazard mitigation program to uses compatible with open space, recreation, or wetlands management practices.²³

Read as a whole, this portion of the regulation seems to set in place a straightforward process to allow for reimbursement for debris removal. FEMA, however, has somewhat complicated this seemingly easy process with 44 C.F.R. § 206.224(b), which singles out debris removal from private property despite the fact that this type of debris appears to be covered in 44 C.F.R. § 206.224(a). Part (b) states that “[w]hen it is in the public interest for an eligible applicant to remove debris from private property in urban, suburban and rural areas, including large lots, clearance of the living, recreational and working area is eligible except those areas used for crops and livestock and unused areas.”²⁴

Singling out private property in this way, though not seeming to imply any different approach from public property, indicates that FEMA intends to treat private property differently from public property.²⁵ In addition to this oddity, the “may provide” language in 44 C.F.R. § 206.224(a) gives FEMA Regional Directors broad discretion to condition the award of reimbursement funds for local governments, complicating the cleanup process by ensuring that no cleanup will follow the exact same rules for each disaster. As a practical matter, even though the Regional Directors have latitude to vary, the requirements are often the same.²⁶

22. 44 C.F.R. § 206.224(a).

23. *Id.*

24. 44 C.F.R. § 206.224(b).

25. *Id.*

26. For example, compare the similar policy provisions in the documentation contained in FED. EMERGENCY MGMT. AGENCY, DEP'T OF HOMELAND SECURITY, PUBLIC ASSISTANCE POLICY

Pending approval by a Regional Director, cleanup on public property is easily reimbursable.²⁷ Generally, reimbursement for public property cleanup should be broadly approved, with compensation proceeding according to a fixed schedule at the outset of cleanup operations, allowing for debris removal from public roads and waterways, among other things, to proceed as quickly as possible.²⁸ Thus, although local governments should not rely on history to assure that they will be reimbursed for such expenditures (due to the broad discretion granted to the Regional Directors to provide such assistance), there is a reasonable expectation that pursuant to a declared emergency, FEMA will authorize these reimbursements.²⁹

Debris removal from private property presents a different situation. Generally, FEMA requires private property owners to utilize their own resources to clean up their property.³⁰ The assumption behind this approach is that, unlike local governments who might be self-insured or whose operation is necessary for the continued function of an area, damage to private property is typically insured and its rapid cleanup is not always necessary to ensure the economic and social viability of an area.³¹ Basically, FEMA does not want to pay unnecessarily if someone else will pay. However, FEMA contemplates that local governments may, under extreme circumstances, have to pay for (and thus will need reimbursement for) the cleanup of certain private property. FEMA states its rule on this possibility as follows:

If debris on private business and residential property is so widespread that public health, safety, or the economic recovery of the community is threatened, the actual removal of debris from the private property may be eligible . . . Debris removal from private property shall not take place until the State or local government has agreed in writing to indemnify FEMA from a claim arising from such removal and obtained unconditional authorization to remove the debris from private property.³²

What, then, is the problem? Why is it so complicated to initiate

REFERENCE MANUAL 45-102 (2007), available at <http://www.fema.gov/pdf/government/grant/pa/policy.pdf>.

27. 42 U.S.C. § 5173(A)(2) (2006).

28. See, e.g., FEMA-322, *supra* note 13, at 45.

29. Abbott also cautions that municipalities should wait for FEMA clearance for debris removal to ensure that funds are available. Abbott, *supra* note 4, at 482-83.

30. FEMA-322, *supra* note 13, at 46.

31. *Id.* An example of private property debris removal that would not be essential for the recovery process of a community to proceed would be a few fallen tree limbs in the yards of private residences. Such debris may be obnoxious to the landowners, but its removal is by no means essential to the function of society.

32. *Id.*

cleanup operations on private property? The answers to these questions are in the post-disaster policy statements FEMA issues setting forth the requirements for obtaining reimbursement approval for conducting private property debris operations.³³ Part of these agreements' boilerplate language requires strict compliance with all local laws in the execution of debris cleanup. As punishment for noncompliance, FEMA can refuse to reimburse local governments for their share of the expenses.³⁴ Such a reality can be a deal-breaker for local governments that seldom have the wherewithal to cover the full expenses of this debris removal. Thus, to secure reimbursement funding, the entity performing the cleanup must comply with all local – in addition to state and federal – laws.

What does compliance with local laws mean? Generally, this statement requires observance of any local or state laws that set forth the due process procedures for right-of-entry onto private property, including cases involving the condemnation or demolition of private structures.³⁵ In short, to facilitate the rehabilitation of a battered area, governments cannot run roughshod over citizens' rights to their private property. As discussed throughout this Article, in times of emergency these requirements can be burdensome, if not impossible, to follow and difficult to navigate with the precision and expediency necessary to return to normalcy.

This situation presents a palpable tension. On the one hand, dire circumstances call for quick and decisive leadership to clean up the mess left by massive disasters so that the rebuilding process can commence. In that sense, time is of the essence. Without prompt action, there is a danger that recovery in a devastated area may never occur. On the other hand, FEMA requires that unless victims are afforded due process, it will not reimburse local governments for the cleanup. The linchpin of this policy guarantees that governments treat citizens who have been victimized by disasters and compensate them fairly and evenhandedly for any taking that may occur.

The irony, however, is that these requirements bring the entire process to a standstill. Giving notice to every landowner whose property has been impacted is often impractical because, in many instances, it is

33. See, e.g., FEMA-9523.13, *supra* note 21, at 2-4. This document notes that local laws must be observed in order for approval to be granted. *Id.* at 2. It also notes that the affected states' attorneys general must prepare a document that discusses and analyzes the constitutional and statutory authority for right-of-entry, demolition, and debris removal on private property in the event that the local and state laws cannot be followed due to extenuating circumstances. *Id.* at 4.

34. See, e.g., FEMA-322, *supra* note 13, at 89 (noting that "FEMA may be required to deobligate funds after the initiation of a project" for failure to comply with certain laws).

35. See FEMA-9523.13, *supra* note 21, at 4.

difficult to locate the landowners in the aftermath of massive disasters.³⁶ Additionally, the cost of following state statutes or local ordinances that typically apply in condemnation/demolition situations is often unduly expensive.³⁷ The central question in this instance thus becomes whether there is any way to relax due process requirements in a disaster to permit the cleanup and recovery to begin. The answer to that question is in the affirmative. But any disaster debris programs set in place in advance of inevitable calamities must follow a strict set of triggering mechanisms and roll-back procedures so that they cannot be misused in either times of calm or after the emergency has abated and compliance with normal due process is once again possible. Additionally, governments contemplating the implementation of *ad hoc* debris management programs are cautioned that in no way can they be authorized to summarily dispense with due process requirements in an emergency or any other situation.³⁸ Some measures of process must always be afforded.

Further, such streamlining does not constitute authorization for the haphazard or indiscriminate demolition of structures that threaten public health. The determination whether to demolish structures or to enter private property should be made on a structure-by-structure or tract-by-tract basis. This is especially true in the case of the historic properties, discussed below. Each determination to enter, to alter, or to demolish structures must be undertaken with due respect and sensitivity to the rights and interests of those affected by such action. Ultimately, however, the final decision regarding debris removal, right of entry, and demolition should rest with the local authorities.

III. RIGHT-OF-ENTRY, DEBRIS REMOVAL, AND DEMOLITION

Although common sense would dictate that the initial action triggering the ability to receive federal reimbursement for debris removal would be the disaster, curiously the federal government requires a “major disaster” declaration for the affected areas from both the president and the respective state governor.³⁹ If a state does not obtain the requisite presidential declaration, it simply will not have access to

36. See, e.g., *A Statistical Look at the Aftermath of Hurricane Katrina*, ASSOCIATED PRESS, Sept. 10, 2005 (noting that more than one million people were forced to leave their homes).

37. See generally *Blanco v. Burton*, No. Civ.A 06-3813, 2006 WL 2366046, at *20 (E.D. La. Aug. 14, 2006) (“Indeed, compliance with federal law can be a costly and bothersome proposition.”).

38. See cases cited *infra* notes 53-55.

39. FEMA-322, *supra* note 13, at 2-3; see also *Abbott*, *supra* note 4, at 470-71. *Abbott* also notes that it is imperative that what the President issues is a “major disaster” declaration and not merely an “emergency” declaration, as the former allows FEMA to provide more comprehensive assistance under the PA program. *Id.* at 471.

FEMA debris reimbursement.⁴⁰ That being said, in disasters requiring federal assistance, it would be unusual for the president not to make such a declaration.⁴¹

Following Hurricane Rita, for example, Louisiana encountered a situation in which the regions declared “disaster areas” were not wide enough to capture all of the land that had been substantially impacted by the storm.⁴² Despite reports of massive damage outside of the emergency zone,⁴³ the practical effect of this designation precluded citizens from applying for and ultimately obtaining FEMA assistance.⁴⁴ Local governments need to be aware of the possibility of such an oversight on the part of politicians because debris cleanup operations in those areas will not be eligible for reimbursement, thereby leaving local residents to bear the burden of cleanup costs. Instead, local leaders should ensure that their state and federal counterparts are aware of the devastation their area has endured so they are not left out of federal assistance programs when the cleanup begins.

With the declaration of a “major disaster” by the president, FEMA will issue a local disaster-specific policy for debris removal.⁴⁵ Following such issuance, the state and local governments will be presented with indemnification agreements into which they must first enter before

40. Abbott, *supra* note 4, at 471-72. Under the Stafford Act, FEMA is not authorized to provide assistance without a presidential declaration. 42 U.S.C. § 5170 (2007).

41. Although this statement is grounded in common sense, which would dictate that a president would declare a disaster where necessary to start the flow of federal dollars, some scholars have suggested that such is not always the case. See THOMAS A. GARRETT & RUSSELL S. SOBEL, *THE POLITICAL ECONOMY OF FEMA DISASTER PAYMENTS*, WORKING PAPER SERIES, WORKING PAPER 2002-012B, at 11 (2002), available at <http://research.stlouisfed.org/wp/2002/2002-012.pdf>. See generally Andrew Reeves, *POLITICAL DISASTER? DISASTER DECLARATIONS AND ELECTORAL POLITICS* (2005), available at <http://www.gov.harvard.edu/student/reeves/fema.pdf>.

42. Bob Anderson, *Livingston Finally Declared Federal Disaster Area*, *ADVOC.* (Baton Rouge, La.), Oct. 16, 2005, at 3 (noting the problems of access to federal assistance for Livingston Parish as a result of having been left out of the declared emergency areas following Hurricane Rita).

43. *Id.*

44. “The damaged facility must be located, or the work must be performed, within the designated area to be eligible for public assistance.” FEMA-322, *supra* note 13, at 24. This problem has also been discussed by Abbott, *supra* note 4, at 472. In discussing the scope of a disaster declaration, Abbott notes that

[i]f a county is included in the declaration for purposes of the public assistance program, then all public entities in that county, and certain nonprofit ones, who have incurred damage from the disaster event are eligible for federal disaster grants. If a county is not included, or a particular assistance program is not activated for that county, then no federal assistance is available, without regard to the scope of damage suffered by any particular entity.

Id.

45. See, e.g., FEMA-9523.13, *supra* note 21, at 2.

FEMA will authorize reimbursement for cleanup activities.⁴⁶ These documents help formulate the rules regarding how a specific debris operation must be conducted. We cannot underscore enough the necessity that state and local governments comply with these documents' provisions. The penalty for failing to do so is severe: Although FEMA may liberally write checks to facilitate cleanup and reconstruction on the front end of a disaster, if the FEMA Inspector General later finds discrepancies or a failure to adhere to the agreements' confines, state and local governments might find *themselves* stuck with a bill from the federal government seeking reimbursement.

In addition, state and local governments must wait for FEMA's approval before commencing debris removal from private property.⁴⁷ FEMA will agree to "work with each State to designate those areas where the debris is so widespread that removal of the debris from private property is in the 'public interest' under 44 C.F.R. § 206.224 and thus eligible for FEMA reimbursement."⁴⁸ Louisiana's experience with Hurricane Katrina clearly demonstrated the unique nature of cleanup operations on private property and the need to await guidance from FEMA before proceeding with such activities.

In extreme situations, debris removal may require the complete demolition of a private structure in order to ensure the protection of public health and safety. At a minimum, it will require entry onto private property, which could constitute a trespass if the local government does not have the proper waivers. As a general rule, local authorities should only demolish structures as a last resort, and they should secure waivers for right-of-entry, debris removal, and demolition from private property owners whenever possible. Unfortunately, people often flee in the wake of disasters, making it difficult to locate property owners.⁴⁹ Thus, local authorities need to be able to expedite the debris removal and demolition process without worrying about violating the law.

To comply with FEMA regulations, debris removal and entry onto private property must be accomplished according to established municipal ordinances.⁵⁰ This raises two major problems: (1) many localities affected by a disaster may not have municipal ordinances granting local

46. FEMA-322, *supra* note 13, at 46.

47. See Abbott, *supra* note 4, at 481-83 (cautioning municipalities to await FEMA clearance before commencing debris operations).

48. FEMA-9523.13, *supra* note 21, at 2.

49. See, e.g., Michael Graczyk, *Legacy of Hurricanes Katrina and Rita is Thousands of New Texans*, ASSOCIATED PRESS, Dec. 24, 2005 (noting the mass exodus of New Orleanians to Texas in the wake of Hurricane Katrina).

50. FEDERAL EMERGENCY MANAGEMENT AGENCY, DEP'T OF HOMELAND SECURITY, FEMA PUBLICATION 325, DEBRIS MANAGEMENT GUIDE, 35 (1999) [hereinafter FEMA-325].

officials a right-of-entry onto private property under such circumstances; and (2) where such ordinances do exist, they are often burdened with specific notice and other due process requirements which frustrate speedy recovery efforts.

Because of these shortcomings in local laws, state and local governments should enact a law protecting the public's health and safety by providing for right-of-entry, debris removal, and demolition that is *only* triggered in emergency circumstances. We propose a hypothetical example of such a statute in Appendix 1.⁵¹ In the alternative, states may choose to follow the structure based on Louisiana law⁵² to deal with inadequate or absent local laws in the event of a disaster.

Speaking directly to the issue of debris removal or property demolition, Louisiana case law provides ample support for emergency municipal activities, undertaken in the general public's best interest, which would otherwise constitute a derogation of due process. In 1882, the Louisiana Supreme Court, with respect to the police power, noted that

[t]here are cases where it becomes necessary for the public authorities to interfere with the control by individuals, of their property, and even to destroy it, when the owners themselves have fully observed all their duties to their fellows and to the State, but where, nevertheless, some controlling public necessity demands the interference or destruction. Strong instances exist where it becomes necessary to take, use or destroy the private property of individuals, to prevent the spreading of a fire, the ravages of pestilence, the advance of a hostile army, or *any other great public calamity*.⁵³

Thus, it is well-settled that the interests of individual citizens may be outweighed by the necessity of engaging in debris removal and demoli-

51. See *infra* app. 1.

52. It is reasonable to expect that other jurisdictions likely have similar jurisprudence. See, e.g., *Friedman v. City of L.A.*, 125 Cal. Rptr. 93, 95 (Cal. Ct. App. 1975) (noting that due process for demolition may be relaxed in emergency situations, saying "[i]n the absence of an absolute emergency, essential elements of due process of law include notice and opportunity to be heard"); see also *Thain v. City of Palo Alto*, 24 Cal. Rptr. 515, 524 (Cal. Ct. App. 1962) (similarly noting that "[i]t is of course long and well recognized that as a general rule municipalities have the power to provide for the summary abatement of nuisances by municipal officials, particularly where an emergency exists"); *City of Rapid City v. Boland*, 271 N.W.2d 60, 66 (S.D. 1978) ("[T]he destruction of sound and substantial buildings has been allowed without due process and without compensation where the destruction or damage was, or reasonably appeared to be, necessary to prevent an impending or imminent public disaster from fire, flood, disease, or riot") (internal citations omitted)).

53. *Bass v. State*, 34 La. Ann. 494, 496 (La. 1882). This case has also been cited in more recent Louisiana Supreme Court cases as authority for justifying takings without compensation. See, e.g., *Avenal v. State*, 2003-3521 (La. 10/19/04); 886 So. 2d 1085, 1107 (citing *Bass*, 34 La. Ann. 494); see also *New Orleans Campaign for a Living Wage v. City of New Orleans*, 2002-CA-0991 (La. 9/4/02); 825 So. 2d 1098, 1104.

tion during a state of emergency.⁵⁴ Even though legal precedents support the suspension of due process in exigent circumstances, there is no guarantee that this suspension of due process will also insulate a municipality from lawsuits resulting from the taking of private property.

In situations where no municipal ordinances granting a right-of-entry or a right to demolish exist, local laws consequently cannot be followed because no law exists, making compliance with FEMA requirements impossible.⁵⁵ Therefore, in instances where local ordinances have not already been enacted, the local governing authority must create them before reimbursable work can commence. Many states' statutes provide for the creation of such new ordinances.⁵⁶

In Louisiana, for example, the legislature enacted section 33:1236, Louisiana Revised Statutes, which defines the powers of local governing authorities.⁵⁷ Section 33:1236 addresses the power of local governing authorities to enact ordinances prohibiting public nuisances, such as "unhealthful growths, trash, debris, refuse, or discarded or noxious matter";⁵⁸ the statute also deals with the "repair and condemnation of buildings, dwellings, and other structures that have become derelict and present a danger" to residents' health and welfare.⁵⁹ Additionally, section 33:1236 empowers local governing authorities to enact ordinances regulating both debris removal from private property and the condemnation and demolition of structures for public health and safety reasons.⁶⁰ All states should create similar laws in advance of any potential disaster situations so that they can easily navigate and apply the law in the event of a disaster.

Alternatively, in Louisiana, and perhaps in other jurisdictions, legal provisions permit local leaders to act unilaterally in the face of a disaster. For example, section 29:737, Louisiana Revised Statutes, grants municipal chief executive officers the authority to issue orders "to preserve the public peace, property, health, or safety within the municipality."⁶¹ Under this authority, a municipal chief executive may issue

54. *See also* *Givens v. Town of Ruston*, 55 So. 2d 289, 291-92 (La. Ct. App. 1951) (noting a town which removed limbs from privately owned trees following a wind storm acted "within its rights" and in the best interest of the public).

55. This means FEMA has basic right-of-entry and demolition requirements that must be followed in order to ensure reimbursement. Without a municipal-level process for following such requirements, there is no clear way to comply with the FEMA mandates.

56. *See, e.g.*, GA. CODE ANN. § 36-61-11; KAN. STAT. ANN. § 17-4759 (2005); N.D. CENT. CODE § 40-58-18 (1989); N.M. STAT. ANN. § 3-46-43 (1978).

57. LA. REV. STAT. ANN. § 33:1236 (2006).

58. *E.g.*, § 33:1236(21)(b)(i).

59. § 33:1236(49)(a)(i).

60. § 33:1236(49)(a)(i).

61. LA. REV. STAT. ANN. § 29:737(A).

orders that reflect the same goals as ordinances municipal officers can create under section 33:1236. Such an approach, however, would require the creation of new orders once a disaster is already underway. Thus, it is preferable to have municipal ordinances already in place in order to ensure compliance with the law and, also, FEMA reimbursement. Additionally, this preferred approach avoids the possibility that an elected official may not want to institute such measures for political reasons when they are urgently needed.⁶² The preferred approach also avoids potential *ultra vires* attacks on government officials that have been instituted in Louisiana in the wake of Hurricanes Katrina and Rita.⁶³

Such ordinances – those municipal officers can create under section 33:1236 and those we propose in Appendix 1 – should also be narrowly tailored to fit the specific needs of the local government because effects of a disaster are unique to a given area. Accordingly, an ordinance can be specially crafted to both respond to these potential effects and to minimize impairment of due process rights under all conditions. Moreover, in enacting such ordinances, the governing authorities of the affected local governments must comply with the standard laws and practices for the creation of ordinances because failure to do so could result in a denial of FEMA reimbursement.⁶⁴ Naturally, this would thwart the attempts of local governments to obtain FEMA reimbursement for subsequent work.

Some local ordinances contain language that would permit government agents or their designees to enter private property.⁶⁵ In instances where such authority may exist, there are still concerns about providing

62. This is based on the presumption that it might be politically unpopular for a municipal chief to unilaterally order the demolition of private structures, while the enacting of ordinances to do so by a municipal legislative body might not present such a political gamble.

63. See, e.g., Plaintiff's Petition for Declaratory Judgment and Damages at 1, *G&T Inv. of La., L.L.C. v. Jefferson Parish*, No. 537681 (La. 19th Jud. Dist. Ct. Nov. 2, 2005) (claiming that various state and local officials exceeded their authority in the issuance of emergency orders following Hurricane Katrina).

64. See, e.g., FEMA-322, *supra* note 13, at 63-87.

65. See, e.g., PHOENIX, ARIZ., CODE § 39-10 (2007) (permitting government officials to enter private property to remove graffiti), available at <http://phoenix.gov/CITYCODE/ch039.html>; LAWRENCE, KAN., CODE § 9-904(F)(3) (2001) (permitting government officials to enter private property to remove debris obstructing stormwater management practices), available at <http://www.ci.lawrence.ks.us/publicworks/pdf/stormwater-pollutionordinance.pdf>; BARDSTOWN, KY., CODE § 51-03(E) (2005) (permitting government officials to enter private property to collect solid waste), available at <http://www.cityofbardstown.org/pdf/ordinances/B2005-22SOLID%20WASTE%20MANAGEMENT.pdf>; JACKSON, TENN., CODE § 13-208 (1999) (permitting government officials to enter private property to remove abandoned vehicles), available at <http://www.cityofjackson.net/departments/buildingcodes/Abandoned%20Vehicle%20Ordinance.pdf>; ALAMO, TEX., CODE § 6-5-4 (2001) (permitting government officials to enter private property to remove abandoned vehicles), available at <http://www.alamotexas.org/vertical/Sites/%7BEC3F575>

due process to the affected landowners if their property is to be substantially altered or demolished to protect public health and safety.

The suspension of constitutional requirements, as embedded and reflected in local ordinances, must be addressed here as well. First, if ordinances exist that are sufficient to satisfy the reimbursement requirements of FEMA, then the notice and due process protections must sometimes be circumvented in emergency situations. This is because it may be impossible to provide adequate notice to affected landowners before entering or altering their private property for the greater good of the general public. Indeed, FEMA in Policy Number 9523.13 recognized the existence of such circumstances in “Alabama, Louisiana, Mississippi, and Texas,” making compliance with the normal condemnation and abatement procedures impractical.⁶⁶

To return some semblance of normalcy and or operability to affected areas, debris removal and health-hazard abatement must begin quickly following a disaster. In the interests of accomplishing these goals, it may be impractical, if not completely impossible, to comply with the typical due process requirements associated with right-of-entry and/or condemnation proceedings. As a basic notion, the law does not require the performance of “vain and useless” acts.⁶⁷ In some situations, attempting to contact all of a disaster area’s affected residents to gain right-of-entry waivers or provide them with notice and a hearing before removing debris from their property could indeed represent a vain effort on behalf of local governments and would unduly hamper recovery efforts. Thus, in rare instances where notice is not possible, and only in instances where a hearing is not practical, such measures must be circumvented.

Persuasive legal authority supporting a governmental entity’s ability to bypass the due process requirements of notice and hearing in the wake of a disaster exists in various jurisdictions across the country.⁶⁸ Because it is not always possible to obtain the necessary waivers prior to commencing such work, FEMA has established documentation checklists for authorities to follow in such instances.⁶⁹ FEMA also recommends that local authorities document their reasons for not obtaining these documents.⁷⁰

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66. FEMA-9523.13, *supra* note 21, at 1-2.

67. *See, e.g., Moore v. St. Paul Fire & Marine Ins. Co.*, 203 So. 2d 548, 553 (La. 1967).

68. *See cases cited supra* notes 52-54.

69. *See FEMA-325, supra* note 50, at 35-36.

70. *Id.* (authorities should document reasons for not obtaining executed “right-of-entry and hold harmless” agreements).

The most notable case allowing for the suspension of due process requirements under emergency circumstances is *North American Cold Storage Co. v. Chicago*.⁷¹ In that case, the Court held that if a public health hazard justifies immediate action, governmental actors can bypass the need for hearings to ascertain the parties' interests before acting. This case is analogous to the situation following many disasters in which hazards on private property cause a potential threat to public health and require a quick governmental response, undeterred by the fact that the private owners are not available to be notified or provided a hearing. Similarly, in *Hall v. McGuigan*, the Delaware Superior Court found that if following due process procedures prior to a taking was impractical due to exigent circumstances, the application of these procedures on a *post hoc* basis was sufficient.⁷²

Together, these cases stand for the premise that even in situations where compensation may be necessary, the notice and comment period may be suspended until after the debris removal or demolition has occurred and the emergency has abated. More to the point, the Ninth Circuit Court of Appeals has stated that "[s]ummary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process."⁷³ These cases provide for a suspension of due process and notice requirements in the event of a disaster. In addition, any emergency declarations that have been made before the commencement of debris operations should further justify immediate responses to public health and safety hazards. As such, leaders of local governments with ordinances allowing right-of-entry and demolition/debris removal from private property should be able to issue executive orders suspending notice and due process rights related to these matters. Such suspensions should be narrowly tailored to meet the immediate needs of the particular disaster recovery and they should be set to expire within a reasonable time.

IV. VEHICLES AS DEBRIS

Following a major disaster, it is not unusual for cars, boats, and other vehicles to be displaced elsewhere, including on private property.⁷⁴

71. *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

72. *Id.* at 1203; *see also* *Srb v. Bd. of County Comm'rs*, 601 P.2d 1082, 1084 (Colo. Ct. App. 1979).

73. *Armendariz v. Penman*, 31 F.3d 860, 866 (9th Cir. 1994); *see also* *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981); *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 155-56 (1952); *Miller v. Campbell County*, 722 F. Supp. 687, 697 (D. Wyo. 1989); *Customer Co. v. City of Sacramento*, 41 Cal. Rptr. 368, 382-83 (Cal. 1995); *Rose v. City of Coalinga*, 263 Cal. Rptr. 124, 128 (Cal. Ct. App. 1987) (citation omitted).

74. *See, e.g., Hurricane Katrina Crushes 350,000 New Orleans Cars*, NEW ORLEANS

Dealing with these objects presents different problems from non-vehicular debris. For example, the private property on which these objects come to rest may belong to a different individual, raising questions about entry onto one party's property to recover another party's debris. Another problem is deciding which party should receive notice of a salvaged vehicle.

Many states have specific laws regarding abandoned vehicles,⁷⁵ but they seldom contemplate disaster situations. When a vehicle moves from one piece of property to another as a result of a natural disaster, the vehicle cannot truly be considered abandoned, but, rather, the owner of the vehicle must be ascertained. Thus, the typical procedures that apply to dealing with abandoned vehicles should not govern when such a vehicle is removed from public or private property after a natural disaster. Apart from the fact that these vehicles have not been abandoned in the traditional sense, many of them are covered by insurance policies or liens, and these insurance companies or lienholders would likely want to identify the vehicles prior to their final disposition.

FEMA's general definition of debris includes vehicles.⁷⁶ Thus, vehicles may be removed from private property in the same fashion as any other debris. As with all of the debris located on private property, there must be an "immediate threat" to life, public health and safety, or public or private property to justify the public entity's removal of the debris, including vehicles, and ensure FEMA reimbursement for this action.⁷⁷

Vehicles, including, but not limited to cars and boats, present a significant threat to the public health and safety, as well as to the environment, which necessitates their expedient removal from wherever they are located. For example, vehicles threaten the safety of children who might use them for play, and they damage land and groundwater if they leak hazardous fluids. Such environmental and health hazards have been noted by the Louisiana Department of Environmental Quality ("DEQ").⁷⁸ DEQ has recognized hazards from automobiles including "gasoline and diesel fuel, refrigerants, lubricating oils, mercury ABS switches, mercury convenience switches, lead acid batteries, brake and

CITYBUSINESS, Sept. 23, 2005, at 1 (noting that thousands of vehicles were destroyed by Hurricane Katrina); see also Steve Ritea, *Cars, Boats Can Be Hauled off for Free; FEMA to Finance Removal of Vehicles*, TIMES-PICAYUNE (New Orleans), Oct. 26, 2006, at 1 (noting the numerous vehicles that ended up on private property following Hurricane Katrina).

75. E.g., ALASKA STAT. § 28.11.010 (2006); DEL. CODE ANN. tit. 21, § 4401 (2007); HAW. REV. STAT. § 290-1 (2006).

76. See FEMA-325, *supra* note 50, at 22; FEMA-322, *supra* note 13, at 45.

77. See FEMA-325, *supra* note 50, at 21.

78. LA. DEP'T OF ENVTL. QUALITY, HURRICANE KATRINA DEBRIS MANAGEMENT PLAN (2005).

transmission fluid, antifreeze, and tires.”⁷⁹ DEQ has also recognized hazards from boats including “gasoline and diesel fuel, refrigerants, lubricating oils, mercury bilge switches, propane tanks, large appliances, lead acid batteries, transmission fluid and electronics, such as, radar sets, radios, GPS units, and depth finders.”⁸⁰ The removal of such vehicles from private property, in addition to advancing the pertinent health, safety, and environmental goals, also substantially advances a return to normalcy for both vehicle owners and their insurers, who are likely awaiting the identification and location of their property.

Quick removal of vehicles from both public and private property ensures FEMA reimbursement and also protects the public by reducing the chance that people acquire these vehicles to mask their damages and sell them to unsuspecting consumers.⁸¹ Thus, entry onto private land to remove vehicles left there by disasters is well within the scope of activities sought to protect the public’s interests, health, safety, and the environment.

In terms of notice and other due process rights, the same procedures apply to vehicles as to all other types of debris. The underlying property owners must receive some measure of *post-hoc* notice and hearing and, once the owners of the vehicles have been identified, notice to them is necessary as well.⁸² In addition, because most vehicles are insured, the vehicles should not be discarded after the owner has been notified, but rather the vehicles should be held in a staging area where insurance adjusters can gain access to assess claims.⁸³

Once a disaster situation has abated, vehicles can continue to present a problem for governmental entities. One example of such a situation arose more than a year after Hurricanes Katrina and Rita in Louisiana. Louisiana’s DEQ and Department of Public Safety (“DPS”) were charged with collecting and disposing of vehicles that had entered the debris stream as a result of these storms.⁸⁴ Pursuant to the Louisiana Motor Vehicle and Traffic Regulation laws codified in section 32:471, Louisiana Revised Statutes, DEQ was specifically obligated to send reg-

79. *Id.* at 6.

80. *Id.* at 7.

81. See, e.g., Greg Thomas, *Car Trouble*, TIMES-PICAYUNE (New Orleans), Aug. 13, 2006, at 1 (noting that it is suspected that numerous cars damaged by Hurricane Katrina may have been stolen and sold as used cars in other states).

82. See LA. DEP’T OF ENVTL. QUALITY, *supra* note 78, at 6.

83. See, e.g., *Hurricane Katrina Crushes 350,000 New Orleans Cars*, *supra* note 74 (noting that the vehicles destroyed by Hurricane Katrina would be taken to staging areas for insurance inspection).

84. Amy Wold, *Storm Cleanup Falls to La. DEQ*, ADVOC. (Baton Rouge, La.), Oct. 31, 2005, at 2-B (noting DEQ was responsible for cleaning up over twenty-two million tons of debris after hurricanes Katrina and Rita); see also Op. Att’y Gen. La. 07-0037 (2007), 2007 WL 1453785.

istered or certified letters, return receipt requested, "to the last known owner of the vehicles at his last known address informing him to remove the vehicle within ten working days from date of receipt of notice."⁸⁵ All motor vehicles which were not removed after receipt of the notice could be removed and disposed of by DPS, the municipality, or a parochial authority.⁸⁶

Although the state agencies complied with the relevant laws,⁸⁷ the varied responses received did not make compliance with the laws seamless.⁸⁸ The replies or responses to the certified letters to the last known owners of the vehicles held in the various staging areas discussed above included: (1) a response; (2) no response; (3) the certified letter was returned as undeliverable; and (4) in some circumstances, the last known owner could not be identified due to missing VIN numbers on the vehicles.⁸⁹ The last three categories present problems not contemplated by the DPS laws noted above.

Ultimately, the Louisiana legislature had to create special legislation to deal with the latter three categories. The proposed bill, section 32:477, Louisiana Revised Statutes, would have created a streamlined procedure for the handling and disposal of motor vehicles seized during a gubernatorially declared state of emergency.⁹⁰ The bill would also have established a procedure whereby vehicles with no responses to certified letters could be discarded by the governmental authority holding such vehicles.⁹¹

Other jurisdictions would benefit from comparing their legislation to the recently proposed Louisiana statute to assess whether preemptive action may avoid the kinds of vehicle problems faced by Louisiana agencies in the wake of Hurricanes Katrina and Rita. Other jurisdictions that do not have such a bill could use the Louisiana bill as a model. It is interesting to note that, although this legislation would have provided for proper notice procedures, it took Louisiana nearly eighteen months to attempt to cure the legislative gap exposed by the 2005 hurricanes.⁹² In

85. LA. REV. STAT. ANN. § 32:475(A) (2006).

86. § 32:475(B).

87. LA. REV. STAT. ANN. § 32:471; *see also* Op. Att'y Gen. La. 07-0037 (2007), 2007 WL 1453785.

88. Telephone Interview by Megan K. Terrell, Assistant Attorney General, Louisiana Department of Justice, with Jackie Moore, Assistant General Counsel, Louisiana Department of Environmental Quality, in Baton Rouge, La. (Nov. 30, 2006) [hereinafter Telephone Interview by Megan K. Terrell].

89. *Id.*

90. *Id.*; S.B. 27, 2006 Leg., 2d Extraordinary Sess. (La. 2006).

91. Telephone Interview by Megan K. Terrell, *supra* note 88.

92. Legislative History, La. S.B. 27, available at <http://www.legis.state.la.us/billdata/History.asp?sessionId=062ES&billid=SB27>.

spite of this attempt, no legislation yet exists in Louisiana to close this gap because the bill did not pass. Such a situation would be avoidable by a proactive review and revision of relevant legislation in other jurisdictions.

V. HUMAN REMAINS AS DEBRIS

A. *Problems with Unearthed Remains*

Although it is commonly assumed that once buried or otherwise interred, a human body will remain in a state of perpetual repose forever, this is far from reality.⁹³ Such a belief is merely a manifestation of our own culture's desire for death to be out of sight and out of mind as quickly as possible.⁹⁴ On numerous occasions, natural disasters have proven that human remains can and will become disinterred, and sometimes they will be forcibly moved to a new location.⁹⁵ When this occurs, FEMA rules merely classify these remains as a form of "debris."⁹⁶ Admittedly, FEMA does provide for some amount of identification to be done on disinterred human remains, but it is quite limited.⁹⁷ This classification of remains as debris is pervasive within FEMA in a Sapir-Whorfian manner.⁹⁸ The semantics of the classification appear to

93. EDWIN MURPHY, *AFTER THE FUNERAL: THE POSTHUMOUS ADVENTURES OF FAMOUS CORPSES*, at ix-xii (1995) (noting the proclivity of folks to disinter the remains of famous individuals over time); see also Ryan M. Seidemann, *Sisters of Destruction: Hurricanes Katrina and Rita Wreak Havoc on Southern Louisiana and Its Cemeteries*, *EPITAPHS*, Summer 2006, at 22 (noting that, among the impacts of the 2005 hurricanes in Louisiana was the disinterment of numerous previously deceased individuals from their "final" resting places).

94. See PETER METCALF & RICHARD HUNTINGTON, *CELEBRATIONS OF DEATH: THE ANTHROPOLOGY OF MORTUARY RITUAL* 200-04 (2d ed. 1991) (describing the history of America's fear of death and how it has evolved into our collective ignorance of the body after death).

95. See, e.g., Seidemann, *supra* note 94, at 22.

96. See, e.g., ANSER ANALYTIC SERVS., INC., LA. FAMILY ASSISTANCE CTR., *CEMETERY REINTERMENT ASSESSMENT 4* (2006) (noting that, because the Stafford Act does not contain language to deal with cemetery reinterment, such matters have "been dealt with by *analogy* to the rules, policies and procedures applicable to debris removal").

97. FED. EMERGENCY MGMT. AGENCY, DEP'T OF HOMELAND SECURITY, *HURRICANES KATRINA AND RITA: FEMA-DR-1603/1607-LA INFORMATION SHEET - # 007*, at 2 (2006) [hereinafter *FEMA INFORMATION SHEET #007*].

98. The theory referenced here is a concept in linguistic anthropology known as the Sapir-Whorf Hypothesis, which essentially asserts that language constrains thought and action. STANLEY R. BARRETT, *ANTHROPOLOGY: A STUDENT'S GUIDE TO THEORY AND METHOD* 20 (1996). The theory was based on Benjamin Lee Whorf's observations of workers carelessly handling fuel drums labeled as "empty," when, in fact, they were anything but empty. The workers were lulled into a false sense of safety by the "empty" label on the drums when, in fact, the drums contained highly explosive fumes that were much more dangerous than the liquid fuel that made up their original contents. In this situation, language (i.e., "empty") directed the workers to act a certain way towards the drums. BENJAMIN LEE WHORF, *The Relation of Habitual Thought and Behavior to Language* (1941), reprinted in *LANGUAGE, THOUGHT, and Reality* 135 (John B. Carroll ed., 1956). Similarly, at FEMA, because human remains are labeled as debris, they are treated with about as much respect. This helps to explain the attitude that lets hundreds of unidentified human

give FEMA the perceived authority to treat deceased human beings in the same manner that they would treat discarded refrigerators. As a practical result, remains are subjected to minimal identification analysis and ultimate responsibility lies with local governments. No funding is provided for DNA analysis, intensive forensic anthropological analysis, or reburial in anything other than a public cemetery even if the cemetery of origin was not public.⁹⁹

Until FEMA creates a new, more respectful classification for human remains, there is little guidance available to local governments trying to cope with warehouses full of human remains. States could respond to FEMA by playing a similar semantics game. With respect to reburial, because FEMA will only pay for reburial in a “public cemetery,” states could statutorily redefine “public cemeteries” in the following manner:

“Public cemetery” means a cemetery owned and operated by a political subdivision. The term “public cemetery” also includes abandoned private cemeteries for which a political subdivision has assumed legal, operational, and maintenance responsibility, whether explicitly or implicitly. The term “public cemetery” also includes any privately owned cemetery that is open to the public for the purposes of interment subject only to their ability to pay the fees of burial and other necessary expenses.

The determining factor for the classification of a cemetery as “public” or “private” for the purposes of Stafford Act compliance is based on the cemetery’s “ownership” rather than its “use.”¹⁰⁰ The purpose of the legislative fix suggested above would be to statutorily classify certain privately owned cemeteries as “public cemeteries” for Stafford Act purposes. Such cemeteries would include those consisting of burial plots or sites sold to the public without restriction other than costs.

The functional significance of this definition, which is supported by some jurisprudence,¹⁰¹ is that all cemeteries that have open burials (i.e., anyone from the public who can pay can be buried there) will be considered “public” whether publicly or privately owned. Although this semantic difference has not yet been tested, it would probably allow FEMA to allocate funding for reburial even in privately owned cemeteries.

As for FEMA’s refusal to provide for or to conduct adequate identi-

remains that were disinterred during Hurricanes Katrina and Rita sit in warehouses with little or no effort to return them to rest. “Why bother?” FEMA must have thought, “it’s just debris.”

99. See FEMA INFORMATION SHEET #007, *supra* note 98, at 2.

100. *Id.*

101. See, e.g., *Sandoz v. Ami, Inc. (In re Provident Gen. Corp.)*, 33 B.R. 241, 244 (Bankr. W.D. La. 1983).

fication analyses, there is no clear answer to solving this problem. Legislative action is needed on a federal level in this respect.¹⁰² Aside from a change to FEMA's operating procedure and regulations forced by legislative action, there is little hope for a change in this policy.

B. *Archaeological Concerns with Unearthed Remains*

Following congressional enactment of the Native American Graves Protection and Repatriation Act ("NAGPRA")¹⁰³ in 1990, virtually every state in the Union created NAGPRA-like laws to protect the sanctity of human remains and burial sites not contained within the confines of traditional cemeteries.¹⁰⁴ Both the federal and state versions of these laws must be considered in disaster situations.

The Louisiana version of NAGPRA, passed in 1992 and known as the Louisiana Unmarked Human Burial Sites Preservation Act ("LUHBSPA"), is fairly representative of state NAGPRA-like laws.¹⁰⁵ The LUHBSPA was enacted to protect "prehistoric and historic Indian, pioneer, and Civil War and other soldiers' burial sites"¹⁰⁶ from land development and pothunters.¹⁰⁷ This law becomes relevant to debris situations when human remains that are not identifiable as deriving from a traditional cemetery end up, through the destructive forces of disasters,

102. Such federal legislation should provide for mandatory DNA testing of all human remains before reburial. "Human remains" should be defined to include unknown or unidentifiable individuals killed during a disaster, as well as unidentifiable remains disinterred by a disaster. Legislatively assigning this requirement to FEMA would avoid FEMA's cost-cutting efforts to later sidestep this important activity by claiming it is not required. The legislation should also require FEMA to establish a catalog to maintain the recovered DNA information for possible later analysis.

103. 25 U.S.C. § 3001 (2000); see Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 LA. L. REV. 545, 546 (2004) (noting that after Native Americans lobbied for twenty years, Congress finally enacted NAGPRA to begin reburying Native American remains and objects from museums and universities across the country); see also Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and Its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149, 155-58 (2003).

104. See, e.g., LA. REV. STAT. ANN. § 8:671 (2006). For a review of such state laws, see generally Michael T. Olexa et al., *No Grave Like Home: Protecting the Deceased and Their Final Resting Places from Destruction Without Going Six Feet Under*, 11 DRAKE J. AGRIC. L. 51, 60-72 (2006), which discusses Florida's protections for unmarked graves, and Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1053-54 (2006), which discusses protections for burials and associated artifacts in Louisiana, Indiana, Washington, and Alabama.

105. LA. REV. STAT. ANN. §§ 8:671-681 (2006).

106. § 8:672; cf. 25 U.S.C. § 3002 (2000) (NAGPRA applicable only to Native American remains).

107. Pothunter is defined as "[a] person who seeks artifacts from past civilizations for personal use, sometimes by illegal means, without adhering to professional standards of archeology." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1374 (4th ed. 2000).

as a part of the debris stream.¹⁰⁸ When this occurs, certain additional requirements may be imposed on those dealing with debris.

Under LUHBSA,

[a]ny person who has reason to believe he or she has discovered an unmarked burial site or received human skeletal remains from an unmarked burial site shall notify the law enforcement agency of the jurisdiction where the site or remains are located within twenty-four hours of discovery. Any person who has reason to believe he or she has discovered or received burial artifacts shall notify the board through the division of archaeology within seventy-two hours of the discovery.¹⁰⁹

Failure to notify the appropriate law enforcement agency carries criminal and civil penalties.¹¹⁰ Once notified by the discoverer, the law enforcement agency has an obligation to further notify the Division of Archaeology.¹¹¹

What does this mean for those on the ground dealing with debris removal? There may very well be instances when human remains covered by NAGPRA-like state legislation, or indeed by NAGPRA itself, end up in the debris stream. To both avoid running afoul of these laws and to ensure that all potentially interested stakeholders and descendants have an opportunity to participate in decisions regarding the final disposition of such disinterred remains, debris managers need to notify local law enforcement and their state historic preservation officer or state archaeologist in the event that human remains are found outside of exempted cemeteries. Such notice would also be in keeping with the much-belabored “compliance with all local, state, and federal laws” for the purposes of reimbursement, and thus is mandatory.¹¹²

VI. PROBLEMS

All of the foregoing proposals for how to adequately and expediently deal with debris following a disaster leave open many questions. First, what is to be done with all of the collected debris? Second, is there any basis for immunity from liability for local governments conducting debris operations? Third, how do states with prohibitions

108. Actually, LUHBSA applies to cemeteries not “operated under the authority of the Louisiana Cemetery Board, or any recognized and maintained municipal, fraternal, religious, or family cemetery.” § 8:674. This may mean that sites that appear to be “traditional” cemeteries (i.e., a distinct area with headstones marking the graves) may also be covered by the law if they are not included in the above list of exempted cemeteries.

109. § 8:680. “Burial artifact” is defined as “any item of human manufacture or use that is in an unmarked burial site.” § 8:673.

110. § 8:680(A).

111. § 8:680(C).

112. See FEMA-9523.13, *supra* note 21, and accompanying text.

against the use of public things to benefit private property justify governmental cleanup of private property? Fourth, what about historic preservation? In this section, we review these problems and propose possible resolutions. This listing of potential problems raised by the issues discussed so far in this Article is not exclusive. Rather, it merely represents what we feel are some important issues that warrant discussion. The answers to these questions will require independent investigation of local laws to elaborate on our proposals, a tangent that is not covered in this Article.

A. *What Do We Do with All of This Stuff?*

As recent disasters have demonstrated, massive amounts of debris must be managed and, ultimately, discarded.¹¹³ Historically, the urgency of dealing with the debris has led to the reopening of closed landfills, as occurred following the September 11 terrorist attacks in the Fresh Kills Landfill on Staten Island, New York,¹¹⁴ and following Hurricane Katrina in the Old Gentilly Landfill in New Orleans.¹¹⁵ The problems inherent in reopening closed landfills are substantial. In New Orleans, for example, the Old Gentilly Landfill had been shut down due to federal regulators' hazard concerns more than twenty years before Katrina hit.¹¹⁶ The public did not let officials overlook these concerns. Concerned groups quickly filed suit against the Louisiana DEQ, citing problems with the renewed use of the landfill, such as the fact that it did not comply with modern environmental protection standards.¹¹⁷ In addition to the problems experienced in the wake of the Old Gentilly reopening, one commentator has noted that there may be further problems for such sites lurking down the road:

Both the federal government, namely the United States Army Corps of Engineers which is the lead agency for removal of Hurricane Katrina debris, and local municipalities, like the City of New Orle-

113. Bob Dart, *Big Easy Chokes On Flood Debris Before It Can Rebuild, New Orleans Must Deal with the Overwhelming Mountains of Garbage Left in Katrina's Wake*, ATLANTA J. & CONST., Dec. 13, 2005, at 1A ("Katrina left about 55 million cubic yards of debris in southeast Louisiana Another 40 million to 50 million cubic yards is piled up around Mississippi, with 2 million more in the Mobile area").

114. John Marzulli & Corky Siemaszko, *Sad and Slow Sifting: Tons of Wreckage Scrutinized at S.I. Landfill*, DAILY NEWS (N.Y.), Sept. 19, 2001, at 66 (noting the reopening of the Fresh Kills Landfill to receive World Trade Center debris).

115. Dart, *supra* note 113, at 1A; *see also* Gordon Russell, *DEQ Replaces Landfill Order; But Lawsuit Says Site Is Still Defective*, TIMES-PICAYUNE (New Orleans), Jan. 25, 2006, at 1 (noting the reopening of the Old Gentilly Landfill and some of the associated problems).

116. *See* Dart, *supra* note 113, at 1A.

117. *See* Russell, *supra* note 115, at 1. Critics raised similar concerns upon the reopening of Fresh Kills. *See, e.g.*, Marjorie J. Clarke, *Soapbox: Con; Reopen Fresh Kills: Brilliant or Boneheaded?*, N.Y. TIMES, Apr. 14, 2002, § 14, at 11.

ans, may be at risk for future CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] actions on account of actual and threatened releases of hazardous substances at sites being used to dispose of the hurricane debris.¹¹⁸

These potential problems could be avoided, or at least substantially mitigated, by planning ahead for debris storage.

In light of the problems caused by reopening landfills due to the lack of other immediate options during desperate times, we recommend that state and local officials act preemptively, during times of calm, to identify areas where certain types of debris can be permanently stored without potentially endangering local populations and the environment. Such a suggestion is also supported by FEMA.¹¹⁹ It is also advisable to prepare contingency plans for the recycling of uncontaminated woody and green debris, as the separation of these materials from the debris stream will reduce the impact on landfills. Further FEMA-proposed recycling and debris reduction methods include contracting with "large-scale recycling operations . . . to segregate and recycle debris as it arrives at . . . storage and reduction sites" and shredding non-recyclables such as "cloth, [certain] plastic, mattresses, rugs and trash" so that volume can be reduced.¹²⁰ Additionally, construction materials such as "concrete, asphalt, gypsum, wood waste, glass, red clay bricks, clay roofing tile, and asphalt roofing tile" can be recycled.¹²¹

The key to ensuring that as much debris as possible is recycled and as little as possible makes it to landfills is to investigate options for handling such matters before a disaster strikes. The lessons of the Fresh Kills and Old Gentilly Landfills should be heeded in this respect. Our landfills are already becoming overburdened without a massive influx of disaster debris.¹²² Local and state leaders need to plan ahead to avoid repeating the mistakes of the past.

B. *Liability Issues*

Another matter of some importance is the immunity of local governments from liability for damages caused as a result of debris opera-

118. Wasik, *supra* note 3, at 354.

119. See FEMA-325, *supra* note 50, at 11-14.

120. *Id.* at 48. Good candidates for segregation and recycling, aside from wood and green debris, are metals and soil. *Id.*

121. *Id.* at 49.

122. See, e.g., William Rathje & Cullen Murphy, RUBBISH! THE ARCHAEOLOGY OF GARBAGE: WHAT OUR GARBAGE TELLS US ABOUT OURSELVES 238-45 (1992) (noting that we have not yet reached crisis stage with respect to non-debris garbage, but that our output of regular waste is remaining steady, necessitating a long-term, comprehensive approach to handling our waste issues in the United States; part of this comprehensive plan should include measures to proactively deal with disaster debris before it becomes a problem as it has in New Orleans).

tions. Experience from Louisiana, in dealing with Hurricanes Katrina (2005), Lili (2002), and Georges (1998), has demonstrated that the question of immunity from liability is not an easy one. Below, we present the current state of Louisiana law on this matter to demonstrate the conflicting jurisprudence and legal thought in one jurisdiction. Each state will have to address this issue individually, as a review of each state's immunity status is beyond the scope of this Article.

As a Louisiana Attorney General opinion recently noted, section 29:735, Louisiana Revised Statutes, "grants general immunity to personnel of the State or any political subdivision thereof, for any actions carried out pursuant to the [Louisiana Homeland Security and Emergency Assistance and Disaster] Act resulting in the death of, or injury to persons, or damage to property as a result of such actions."¹²³ This notion of local immunity was supported by the recent case of *Castille v. Lafayette City-Parish Consolidated Government*,¹²⁴ which dealt with people injured as a result of debris operations following Hurricane Lili in 2002. The court in this case found that section 29:735(A) did immunize the City of Lafayette "from liability for injuries or damages sustained as a result of the City's emergency preparedness activities."¹²⁵

De La Cruz v. Riley,¹²⁶ a case with facts similar to those in *Castille*, presents a somewhat different outcome. This case involved a fatality and injuries in an automobile accident caused by debris from Hurricane Georges.¹²⁷ For unknown reasons, however, the municipality in *De La Cruz* never raised an immunity defense. Thus, although the facts are similar to *Castille*, and the case deals with post-hurricane debris liability, the legal issues upon which the court decided the case appear substantially distinguishable from *Castille*. If *De La Cruz* can be cited for anything with respect to debris operations, however, it stands for the notion that cleanup crews, despite their probable immune status, must exercise the utmost care in their debris removal activities to ensure the best possible protection of lives and property.¹²⁸

123. Op. Att'y. Gen. La. 05-0360 (2005), 2005 WL 2865900, at *3.

124. *Castille v. LaFayette City-Parish Consol. Gov't*, 04-1596 (La. App. 3 Cir. 3/2/05); 896 So. 2d 1261, writ denied, *Castille v. LaFayette City-Parish Consol. Gov't*, 05-0860 (La. 5/13/05); 902 So. 2d 1029.

125. *Id.* at 1262.

126. *De La Cruz v. Riley*, 04-0607 (La. App. 4 Cir. 2/2/05) 895 So. 2d 589, writ denied, *De La Cruz v. Riley*, 05-0513 (La. 4/22/05); 895 So. 2d 589.

127. *Id.* at 591-93.

128. *Id.* at 594 ("We find, as the trial court did, that the Parish, therefore, had control as to the final location of the pile of debris and it was the Parish's responsibility, once the removal commenced, to complete the job. Mr. Riley was not in a position to control the location of the pile of debris and . . . therefore should not be liable for its location and the damaged that resulted there from.").

Considering this conflict in Louisiana jurisprudence, we cannot overstate the importance of immunity provisions as part of states' emergency legislation. Inclusion of these provisions could alleviate confusion, like the Louisiana courts encountered, and would avoid outstanding questions of liability that may currently dissuade local governments from undertaking debris removal operations.

C. *Using Public Things to Benefit Private Property*

In Louisiana, as in many other jurisdictions,¹²⁹ there are clear prohibitions against the use of public things (including manpower) to benefit private property without appropriate compensation to the relevant public body.¹³⁰ Under article VII, section 14 of the Louisiana Constitution, it is a violation of the prohibition against the use of public resources for the benefit of private interests to use public equipment or labor to remove debris from private property in non-emergency situations, absent a preexisting obligation on behalf of the state or its political subdivisions.¹³¹ As long as debris removal from private property occurs during a declared state of emergency and the debris located on private property constitutes an "immediate threat" to public health and safety, however, that removal activity is validly classified as serving a necessary public purpose to which such prohibitions do not apply.¹³² Although state-to-state variations of this prohibition make a blanket statement of inapplicability impossible, it is probable that the public purpose of returning life to some semblance of normalcy and the protection of the public's health and safety would justify the use of public things to conduct debris operations on private property in virtually all United States jurisdictions.

129. Numerous other jurisdictions have similar prohibitions that should be taken into account when considering this problem. *See, e.g.*, CAL. CONST. art. XVI, § 6; OKLA. CONST. art. X, § 15(A).

130. LA. CONST. art. VII, § 14.

131. *See* Op. Att'y Gen. La. 05-0360 (2005), 2005 WL 2865900, at *1 ("Article VII, Section 14 of the 1974 Louisiana Constitution generally prohibits the funds, credit, property or things of value of this state or any political subdivision from being loaned, pledged or donated to or for any person, association or public or private corporation."); Op. Att'y Gen. La. 05-0360-A (2005), 2005 WL 2865901, at *1 ("[I]n general, the use of parish equipment and labor on private property is prohibited by Article VII, Section 14 of the Louisiana Constitution . . .").

132. *See supra* Part II.B; *see also* Op. Att'y Gen. La. 05-0360 (2005), 2005 WL 2865900, at *1 ("[P]ublic equipment and labor, which may include more than only parish equipment and labor in catastrophic circumstances, may be used without an authorized right of entry to protect the residential private property of the citizens of those areas in southeast Louisiana that experienced such severe flooding that the citizens have been unable to return to their homes in the event of a declaration of an emergency or disaster . . ."); Op. Att'y Gen. La. 05-0360-A (2005), 2005 WL 2865901.

D. *Historic Preservation Concerns*

1. COMPLIANCE WITH HISTORIC PRESERVATION LAWS

During the debris removal and the reconstruction processes, it is incumbent upon local governments to ensure the protection of historic and archaeological resources for future research and education. Despite the power that some local governments may have to suspend their local historic preservation ordinances to expedite the recovery process, this power does not eliminate the requirement that these entities must continue to comply with state and federal preservation laws and regulations. Section 106 of the National Historic Preservation Act¹³³ requires FEMA, in consultation with the State Historic Preservation Office, to identify properties potentially eligible for or listed on the National Register of Historic Places ("NRHP") and to adequately consider the effect of any FEMA-funded undertaking, including potential demolition of private and public property, on identified historic properties.¹³⁴ FEMA's historic preservation responsibilities must be fulfilled before FEMA-funded activities can be initiated.¹³⁵ If an applicant for FEMA assistance proceeds with an undertaking before FEMA has satisfied these requirements, FEMA reimbursement will be jeopardized.¹³⁶ Therefore, local governments should not summarily suspend or abolish their local historic preservation boards or commissions. Rather, to expedite the notice and hearing process associated with how to deal with badly damaged historic properties, we urge local governments to issue an ordinance or proclamation that streamlines this process. This approach is more prudent than eliminating the process altogether and thereby potentially jeopardizing FEMA reimbursement funding if a NRHP eligible structure or site is damaged or altered in the cleanup process.

2. ARCHAEOLOGICAL ARTIFACTS

Recent non-hurricane disaster events in Louisiana have illustrated yet another debris problem that has neither been legislatively addressed nor covered in the FEMA literature: what should be done with archaeological artifacts that turn up in the debris stream? States have an interest in being able to obtain ownership of these artifacts so that they can be maintained in a controlled manner and made available for research purposes.¹³⁷ It is a generally accepted tenet, however, that archaeological

133. 16 U.S.C.A. § 470(f) (2007).

134. FEMA-322, *supra* note 13, at 108-09.

135. FEMA-325, *supra* note 50, at 35-37.

136. FEMA-322, *supra* note 13, at 89.

137. Such an interest derives from general archaeology ethical principles, which hold that preservation of archaeological remains should be accomplished so as to benefit society as a whole

artifacts derived from private land are generally the private property of the landowner.¹³⁸ Consequently, multiple parties may vie for control and ownership of artifacts when they turn up in the debris stream. The issue of archaeological artifact debris admittedly represents the least clear issue we analyze in this Article. In fact, this area of law is ripe for legislation at the state and local levels precisely because it is so unclear; relevant legislation could avoid problems before they occur.

Because government entities or their contractors are often the ones dealing with debris removal, they will most likely be the first custodians of these artifacts. The question then is whether the government has to give the private landowners a right of first refusal to the artifacts. Since archaeological remains located on private property are the property of the private landowner, if the artifacts are clearly identifiable as having come from one landowner's tract, the government should notify those landowners and allow them the right to reclaim their property. A suggestion that it would be more beneficial for educational and research purposes for the government to retain the materials should accompany that notice.

However, when a disaster is widespread and the debris of multiple landowners is commingled, making it unclear whose tract the artifacts have derived from, the solution is not as simple. It may be unconstitutional for a government to return the artifacts to individuals without evidence of their place of origin because doing so may constitute a divestiture of the true landowner's private property rights in the event that the artifacts are given to an incorrect recipient. There seems to be no clear or correct answer regarding what to do in such situations.

As with other scenarios discussed in this Article, a local government's best option in dealing with archaeological artifact debris is to first analyze applicable state and local laws to determine if they provide any guidance. In the absence of such guidance, we suggest that the governmental entity in possession of the artifacts transfer custody to the relevant state archaeological authority. This authority could then hold the artifacts until a claim is made by a landowner and that claim can be evaluated. The authority is likely under a duty to advertise that it has the

through their study. See generally PRINCIPLES OF ARCHAEOLOGICAL ETHICS (Soc'y for Am. Archaeology 1996), available at <http://www.saa.org/aboutSAA/committees/ethics/principles.html>. Private ownership stifles this objective because the public seldom has an opportunity to view privately owned artifacts or to learn anything about our shared human history from them. States have enacted many of their preservation laws to forward this dogma. See, e.g., Olexa et al., *supra* note 104, at 61 (noting that the Florida legislature has enacted archaeological laws "to further the goals of preserving and protecting the state's cultural heritage").

138. See Olexa et al., *supra* note 104, at 60 ("[O]wnership of artifacts generally depends upon where they are found. Artifacts discovered on private property belong to the landowner.").

artifacts and to allow people to make claims for them. In the event that no claim is made, the state authority should continue to curate the artifacts until the expiration of time for private claims to the property. At the expiration of the claims period, the government would become the owner of the artifacts through abandonment.

VII. CONCLUSION

It is impossible in one article to identify every possible debris-related problem that any particular U.S. jurisdiction may encounter in the wake of a disaster. Yet, we hope that our discussion of the basic legal procedures for initiating the debris cleanup process and the lessons learned in Louisiana after Hurricanes Katrina and Rita can help other similarly situated jurisdictions expedite future recovery processes.

The simple reality, however, is that disasters will occur no matter how prepared jurisdictions are. It is not a matter of if, but a matter of when. The entire nation is at risk of being struck by some type of disaster at some time. The best way to deal with the fallout from these disasters is to be prepared for them to the best extent possible. State and local governments should act now to ensure that mechanisms, both legal and logistical, are in place to deal with problems like debris management. Make a plan, and make it now, in advance of the next inevitable disaster.

APPENDIX 1. A PROPOSED DEBRIS MANAGEMENT STATUTE

The following is a proposed statute dealing with many of the shortcomings in state laws this Article identified. This proposed statute is intended for use as a model for state legislation. When constructing this proposed statute, we saw no need to reinvent the wheel, so to speak, on all matters. As such, large portions of the proposed statute have been quoted, with minor alterations (noted in brackets), from existing state statutes. We also identify which states, other than the ones whose statutes are actually quoted, have similar provisions in their statutes. Many states already have some of the provisions that we feel are important; we list these, too. No state has a comprehensive set of rules, like the one we propose *infra*, to deal with debris management issues following a natural or anthropogenic disaster. Thus, we recommend that states with some provisions related to these issues consolidate their existing laws into one chapter and amend those laws with adaptations of our proposals where necessary. States with no such laws should enact something akin to our proposal as soon as possible. The use of our statute's original sections (identifiable as the portions not set off by quotation marks) should help to close the gaps in existing laws and avoid many of the problems we identified in this Article.

Section 1. Right-of-Entry to Private Property in a State of Emergency or Major Disaster.

- (A) "When the Governor has declared a [state of emergency], or the President, at the request of the Governor, has declared a major disaster or emergency to exist in this state, the Governor may":¹³⁹
 - (1) "through the use of state [or municipal] agencies [or private contractors of state or municipal agencies], clear from publicly or privately owned land or water debris and wreckage that may threaten public health, safety, or [public or private] property;"¹⁴⁰

139. ALASKA STAT. § 26.23.110(a) (2006); *see also* CONN. GEN. STAT. ANN. § 28-9c(a) (West 2007); IOWA CODE ANN. § 29C.6(4) (West 2006); ME. REV. STAT. ANN. tit. 37-B, § 744(4)(A) (2006); MONT. CODE ANN. § 10-3-315(1) (2005); OR. REV. STAT. ANN. § 401.145(1) (West 2005); VT. STAT. ANN. tit. 20, § 36(a) (2005); V.I. CODE ANN. tit. 23, § 1134(a) (2005).

140. ALASKA STAT. § 26.23.110(a)(1); *see also* CONN. GEN. STAT. ANN. § 28-9c(a)(1) (West 2007); IOWA CODE ANN. § 29C.6(4) (West 2006); ME. REV. STAT. ANN. tit. 37-B, § 744(4)(A)(1) (2006); MONT. CODE ANN. § 10-3-315(1)(a) (2005); N.Y. EXEC. LAW § 29(3) (McKinney 2007); N.D. CENT. CODE § 37-17.1-21(1) (2005); OR. REV. STAT. ANN. § 401.145(1)(a) (West 2005); P.R. LAWS ANN. tit. 25, § 172n (2003); TEX. GOV'T CODE ANN. § 418.023(a) (Vernon 2006); VT. STAT. ANN. tit. 20, § 36(a)(1) (2005); V.I. CODE ANN. tit. 23, § 1134(a)(1) (2005).

- (2) through the use of state or municipal agencies or private contractors of state or municipal agencies, “access property using privately owned roads for [the] purposes of providing . . . debris cleanup;”¹⁴¹
 - (3) “apply for and accept funds from the federal government and use those funds to make grants to a political subdivision for the purpose of removing debris or wreckage from publicly or privately owned land or water.”¹⁴²
 - (4) “[w]hensoever the Governor provides for clearance of debris or wreckage [pursuant to a declaration described in subdivision (A) of this section], employees of [state or municipal agencies or private contractors of state or municipal agencies] are authorized to enter upon private land or waters and perform any tasks necessary to the [debris] removal or clearance operation.”¹⁴³
- (B) “Authority under this section shall not be exercised[, subject to the exceptions in subdivision D of this Section,] unless the affected political subdivision, corporation, organization or individual owning such property shall first present an unconditional authorization for removal of such debris or wreckage from public and private property and, in the case of removal of debris or wreckage from private property, shall first agree to indemnify the state against any claim arising from such removal.”¹⁴⁴
- (C) If, at any time, services for debris cleanup or demolition or any other activity contemplated by this Chapter are rendered on private property, such services “shall be limited to the cleanup of debris[,”

141. ALA. CODE § 45-2-140 (2006).

142. ALASKA STAT. § 26.23.110(a)(2) (2006); *see also* IOWA CODE ANN. § 29C.6(4) (West 2006); ME. REV. STAT. ANN. tit. 37-B, § 744(4)(A)(2) (2006); MONT. CODE ANN. § 10-3-315(1)(b) (2005); N.D. CENT. CODE § 37-17.1-21(2) (2005); OR. REV. STAT. ANN. § 401.145(1)(b) (West 2005); TEX. GOV'T CODE ANN. § 418.023(b) (Vernon 2006); VT. STAT. ANN. tit. 20, § 36(a)(2) (2005); V.I. CODE ANN. Tit. 23, § 1134(A)(2) (2005).

143. ME. REV. STAT. ANN. tit. 37-B, § 744(4)(B)(2) (2006); MONT. CODE ANN. § 10-3-315(2)(b) (2005); N.D. CENT. CODE § 37-17.1-21(2) (2005); OR. REV. STAT. ANN. § 401.145(3) (West 2005); R.I. GEN. LAWS § 30-15.4-2(b) (2006); TEX. GOV'T CODE ANN. § 418.023(d) (Vernon 2006); VT. STAT. ANN. tit. 20, § 36(c) (2005); V.I. CODE ANN. tit. 23, § 1134(c) (2005).

144. CONN. GEN. STAT. ANN. § 28-9(c)(b)(1) (West 2007); *see also* IOWA CODE ANN. § 29C.6(4) (West 2006); ME. REV. STAT. ANN. tit. 37-B, § 744(4)(B)(1) (2006); MONT. CODE ANN. § 10-3-315(2)(a) (2005); N.D. CENT. CODE § 37-17.1-21(2) (2005); OR. REV. STAT. ANN. § 401.145(2) (West 2005); P.R. LAWS ANN. tit. 25, § 172n (2003); R.I. GEN. LAWS § 30-15.4-2(a) (2006); TEX. GOV'T CODE ANN. § 418.023(c) (Vernon 2006); VT. STAT. ANN. tit. 20, § 36(b) (2005); V.I. CODE ANN. tit. 23, § 1134(b) (2005).

demolition] and repair damage caused by a . . . disaster [to the extent that such work is essential to protect private property from further damage. Such services] shall not be utilized for work relating to general home improvements [or any other non-disaster related work on private property].”¹⁴⁵

- (D) (1) In the event that it is not practicable or possible to obtain authorization or indemnification for the removal of debris from public or private property by reason of being unable to locate or identify the owner, the state or municipal agency or the private contractor of the state or municipal agency may enter upon such property (a) for the express purpose of carrying out debris removal and demolition operations that are necessary for the protection of the public health, safety, or welfare; or (b) for the purpose of securing public or private property from further damage, destruction, or conversion until such time as the owner can be identified or located.¹⁴⁶
- (2) Once the owner of such property has been identified or located, all practicable due process shall be afforded the owner.

Section 2. Vehicles Damaged During a Disaster.

(A) Notice to buyers and the Office of Motor Vehicles.

- (1) “No person, firm or corporation shall knowingly sell in this state any motor vehicle the mechanical or electrical system of which has been previously damaged by the ravages of a . . . disaster . . . to an extent which rendered the vehicle inoperable for any period of time, unless notice, in writing, of the fact of such damage, the nature and extent thereof and the date and location in which it occurred is first given to each buyer of such motor vehicle. For the purposes of this Section, a vehicle shall be deemed to have been rendered inoperable if, as a result of the damage caused by the . . . disaster, it would be necessary for such vehicle to undergo repair in order to pass inspection in the manner provided [by the Office of Motor Vehicles].”¹⁴⁷

145. OKLA. STAT. ANN. tit. 62, § 2202(West 2006).

146. See TEX. GOV'T CODE ANN. § 418.023(c) (Vernon 2006); V.I. CODE ANN. tit. 23, § 1134(a)(1) (2005); VT. STAT. ANN. tit. 20, § 36(a)(1) (2005).

147. N.Y. GEN. BUS. § 396-k (McKinney 2007).

- (2) Nor shall any motor vehicle be sold in this state the body or interior of which has previously been damaged by the ravages of a disaster to an extent which required replacement of body or interior parts, "unless notice, in writing, of the fact of such damage, the nature and extent thereof and the date and location in which it occurred is first given to each buyer of such motor vehicle."¹⁴⁸ For the purposes of this Section, interior damage includes the replacement of interior carpet in any portion of the vehicle.
 - (3) "Violation of this Section shall constitute a . . . misdemeanor."¹⁴⁹
 - (4) If any vehicle has been damaged, whether sold or not, according to subdivisions A(1) or A(2) of this Section, the owner and the vehicle's insurer shall, within ninety days of completion of repairs to the vehicle, mail notice of the damages and the repairs to the Office of Motor Vehicles. The insurer is only required to comply with this subdivision if a claim was made.
- (B) "Abandoned motor vehicles; gubernatorial declared state of emergency; disposal by state and political subdivisions; notice requirements; disposition of proceeds.
- (1) If a state agency or political subdivision seizes a motor vehicle that was illegally parked, stationed, or abandoned on a public street or highway within a [county] in which a gubernatorially declared state of emergency is in effect at the time of seizure, the provisions of this [subdivision] shall apply to the disposition of the motor vehicle, and the provisions of this [subdivision] shall supersede the provisions of [normal, non-disaster abandoned vehicle laws] to the extent that they are in conflict.
 - (2) (a) Within ten days after seizing the motor vehicle, the state agency or political subdivision seizing the motor vehicle shall mail a written notice, by certificate of mailing, to the owner of the motor vehicle at his last known address on file with the [Office of Motor Vehicles]. The notice shall include the following information:

148. *Id.*

149. *Id.*

- (i) The name of the state agency or political subdivision holding the motor vehicle and the manner in which it can be claimed.
 - (ii) That in order to claim the motor vehicle, the owner must pay all costs and charges imposed by the seizing authority for the removal and storage of the motor vehicle.
 - (iii) That in lieu of claiming the motor vehicle, the owner may remit fifteen dollars to the state agency or political subdivision holding the motor vehicle together with a completed certificate of authority to remove and dispose of the abandoned motor vehicle. The certificate of authority shall be on a form prescribed by the [agency] and shall be sent to the owner of the abandoned motor vehicle with this notice and with a self-addressed, stamped return envelope.
- (b) The state agency or political subdivision shall retain adequate documentation concerning the mailing of this notice for no less than three years.
- (3) The motor vehicle shall be considered abandoned to the state or political subdivision if the owner of the motor vehicle has not done any of the following within three months of the mailing of the notice provided for in subdivision [B(2)] of this [subdivision]:
 - (a) Responded to the letter.
 - (b) Remitted the fifteen dollars and a certificate of authority.
 - (c) Claimed the motor vehicle.
- (4) If the motor vehicle is considered abandoned, the state agency or political subdivision holding the motor vehicle shall send a final notice to the owner of the motor vehicle indicating its intent to dispose of the abandoned motor vehicle. Final notification shall be provided for in accordance with the following procedure:
 - (a) (i) The state agency or political subdivision shall

mail a final notice, by certificate of mailing, to the owner of the abandoned motor vehicle at his last known address informing such owner that the state agency or political subdivision is holding the abandoned motor vehicle.

- (ii) The final notice shall inform the owner that the vehicle shall be sold to the highest bidder, crushed, dismantled, or otherwise disposed of unless the owner, on or before the date of disposal, claims the motor vehicle and pays to the seizing authority all costs, charges, and fees incurred by the seizing authority for the detention and storage of the abandoned motor vehicle.
 - (b) The state or political subdivision shall also publish an advertisement in the official journal of the state and the [county] or municipality in which the vehicle was abandoned, on no fewer than three separate occasions within a ten day period, prior to the date of disposal of the abandoned motor vehicle. The advertisement shall contain the following information:
 - (i) A complete list of the abandoned motor vehicles to be disposed of.
 - (ii) A description of each vehicle and, to the extent practicable, the name of the last registered owner of each abandoned motor vehicle.
 - (iii) The date and location in which the abandoned motor vehicles will be disposed of together with notice that the abandoned motor vehicles may be disposed of individually or in lots.
 - (c) The state agency or political subdivision shall retain adequate documentation concerning the mailing of the final notice, advertisement in the official journal, and appraisal for no less than three years.
- (5) Prior to disposal of the abandoned motor vehicle, the seizing authority shall have the motor vehicle appraised by a competent appraiser.

- (6) If the state agency or political subdivision receives no response from the owner within thirty days of mailing the final notice, the state agency or political subdivision shall proceed with disposal of the abandoned motor vehicle without the necessity of further notice to the owner of the abandoned motor vehicle. Upon final disposal of an abandoned vehicle, the state agency or political subdivision shall notify the office of motor vehicles of such disposition.
- (7) All funds received from the disposal of an abandoned motor vehicle under the provisions of this [subdivision] shall be set aside into a separate account established by the seizing authority. If, within one year following the date of disposal of the abandoned motor vehicle, the owner of a disposed of motor vehicle presents proof of his ownership, the owner shall be entitled to his share of the proceeds realized from the disposal of the motor vehicle minus all costs, fees, and expenses associated with the detention, storage, and sale of the abandoned vehicle. Any funds not claimed within one year following the date of disposal of the abandoned motor vehicle shall be deposited into the general fund of the seizing authority.
- (8) For purposes of this Section, 'owner' shall mean the last registered owner of a motor vehicle, the holder of any lien on a vehicle, and any other person with an ownership interest in a vehicle."¹⁵⁰

Section 3. Debris Management Plan; Debris Recycling.

- (A) "The [state, through its environmental management agencies,] shall develop and implement a comprehensive debris management plan for debris generated by state and federally declared disasters and debris generated from the rebuilding efforts resulting from these disasters. The management plan shall be to reuse and recycle material and to divert debris from disposal in landfills to the maximum extent practical, efficient, and expeditious in a manner that is protective of human health and the environment. The plan shall be consistent with state and federal law and shall not supersede any ordinance adopted by a local governing authority. In developing such plan, the secretary shall utilize the following debris management practices in order of priority, to the extent they

150. S.B. 27, 2006 Leg., 2d Extraordinary Sess. (La. 2006).

are appropriate, practical, efficient, timely, and have available funding:

- (1) Recycling and composting.
 - (2) Weight reduction.
 - (3) Volume reduction.
 - (4) Incineration or co-generation.
 - (5) Land disposal.”¹⁵¹
- (B) “Green and woody debris may be used in coastal restoration projects, as compost, or as fuel. Green and woody debris shall not be disposed of in a landfill as the first option; however, such debris may be used as a component of the cover system for a landfill or a means for providing erosion control.”¹⁵²
- (C) “The comprehensive debris management plan shall utilize the most environmentally beneficial management techniques consistent with the health, safety, and welfare of the citizens of the state, to the extent funding is available, and shall promote the efficient and expeditious management of the debris.”¹⁵³

Section 4. Historic Preservation.

- (A) “No structure that is listed on the National Register of Historic Places, on the [State] Register of Historic Places, or on any local public register of historic places [, or is potentially eligible for such listing,] and that has been damaged due to a . . . disaster . . . may be demolished, destroyed, or significantly altered, except for restoration to preserve or enhance its historical values, unless the structure presents an imminent threat to the public of bodily harm or of damage to adjacent property, or unless the State [Historic Preservation Office] determines . . . that the structure may be demolished, destroyed, or significantly altered.”¹⁵⁴
- (B) “Any local government may apply to the State [Historic Preservation Office] for its determination as to whether a structure meeting the description set forth in subdivision (A) of this Section shall be

151. LA. REV. STAT. ANN. § 30:2413.1(B) (2006).

152. § 30:2413.1(C).

153. § 30:2413.1(D).

154. CAL. PUB. RES. CODE § 5028(a) (West 2007).

demolished, destroyed, or significantly altered.”¹⁵⁵

- (C) Representatives from the State Historic Preservation Office or from the Historic Preservation Office of the Federal Emergency Management Agency, or private contractors hired by the state and having the same professional qualifications as the employees of the State Historic Preservation Office, shall
 - (1) accompany all demolition crews working in the declared disaster area;
 - (2) have the authority to halt demolition activities in order to make an assessment of the historic value of structures;
 - (3) be onsite to monitor and document demolition activities on any structure determined to be listed on the registers in subdivision (A) of this Section;
 - (4) make recommendations for structures slated for demolition to be added to local, state, or federal registers of historic places; and
 - (5) to the maximum extent practicable, salvage all information of historic or scientific value from historic structures that are slated for demolition. Such information includes, but is not limited to, photographs of the structure, design plans of the structure and any significant architectural features, and actual artifacts from the structure.
- (D) In the event that the Governor has declared a state of emergency, or the President, at the request of the Governor, has declared a major disaster or emergency to exist in this state,
 - (1) local governing authorities shall not suspend or disband any municipal agency tasked with protecting historic structures;
 - (2) nor shall any state governing authority suspend or disband any state agency tasked with protecting historic structures;
 - (3) nor shall any state statutes or regulations or municipal ordinances relating to the protection of historic structures be suspended.

155. § 5028(b).

Section 5. Unearthed Human Remains Found Following a Disaster.

- (A) For the purposes of this section, “unearthed human remains” includes any and all human remains that have been disinterred, whether from a cemetery or other place of repose, by the forces of a disaster.
- (B) Upon the discovery of unearthed human remains, the discoverer shall contact local law enforcement and the state archaeologist and provide them with the location of the remains. Local law enforcement and the state archaeologist shall coordinate efforts to determine if the remains are classified as being under the jurisdiction of an established cemetery or of the state’s unmarked human burials laws.
- (C) At any time, should it be determined that any unearthed human remains derived from a known or unknown archaeological site, jurisdiction over such remains shall rest with the state archaeologist. The final disposition of such remains shall be controlled by the relevant portions of the state’s unmarked human burials law or the Native American Graves Protection and Repatriation Act,¹⁵⁶ whichever is applicable.
- (D) In no event shall any unearthed human remains be reburied, unless their identity is readily obtainable, without the extraction, by a forensic scientist, of a sample sufficient to conduct DNA testing on for identification purposes. It shall be the duty of the state health department to curate such samples until such time as they are used to perform DNA tests. Such DNA tests shall be conducted only if sufficient funding is available. The results of such tests shall be retained by the state health department for the purposes of identifying next of kin.
- (E) In no event shall any unearthed human remains be reburied, unless their identity is readily obtainable, without the completion of a complete forensic anthropological analysis of the remains and x-rays of the dentition for the purposes of identification. The results of the analysis and the x-rays shall be curated by the state health department in the same file as the DNA information in subdivision D of this Section.

156. 25 U.S.C. § 3001 (2000).

- (E) Once the analyses and sampling described in subdivisions D and E of this Section are complete, and should no positive identification of unearthed human remains be made, the authority holding the remains shall reinter the remains in a manner to be prescribed by law. Such interment shall be in an active public cemetery. The grave shall be marked with a permanent marker that identifies the remains by the state health department file number. A photograph of the grave, along with global positioning system coordinates of the burial location shall be sent to the state health department. The state health department shall curate this documentation in the same file as the information in subdivisions D and E of this Section.
- (F) “Except for analysis on quality control samples, [DNA] tests performed on all unidentified human remains . . . shall be used only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters.”¹⁵⁷
- (G) Subdivisions D through F of this Part shall not be interpreted to supersede the state’s unmarked burials law or the Native American Graves Protection and Repatriation Act.¹⁵⁸
- (H) All cemeteries, whether public or private, following a disaster, shall notify local law enforcement and the state health department of any burials that appear to have been disturbed to the point that remains may have been unearthed by the disaster.

Section 6. Immunity from Liability.

- (A) “Except in cases of willful misconduct, gross negligence or bad faith, any state [or municipal] employee [or employee of a private contractor for a state or municipal agency], complying with orders of the Governor and performing duties pursuant thereto under [Sections 1 through 5 of this Chapter] shall not be liable for death of or injury to persons or damage to property occurring during performance of those duties.”¹⁵⁹

157. LA. REV. STAT. ANN. § 15:659(D) (2006).

158. 25 U.S.C. § 3001.

159. ME. REV. STAT. ANN. tit. 37-B, § 744(4)(B)(3) (2006); *see also* ALASKA STAT. § 09.65.091; CAL. GOV’T CODE § 8657 (West 2007); COLO. REV. STAT. ANN. § 13-21-108.3 (West 2006); HAW. REV. STAT. § 128-18 (2006); 20 ILL. COMP. STAT. ANN. 3305/21 (West 2006); KAN. STAT. ANN. § 60-4201(2005); MO. ANN. STAT. § 44.023 (West 2006); N.C. GEN. STAT. ANN. § 83A-13.1 (West 2006); N.D. CENT. CODE § 37-17.1-21(2) (2005); OKLA. STAT. ANN. tit. 76, § 5.8 (West 2006); OR. REV. STAT. ANN. § 401.145(4) (West 2005); R.I. GEN. LAWS § 30-15.4-2(c) (2006); TEX. GOV’T CODE ANN. § 418.023(d) (Vernon 2006); VT. STAT. ANN. tit. 20, § 36(d) (2005); V.I. CODE ANN. tit. 23, § 1134(d) (2005).